

FINAL STATEMENT OF REASONS

Decision Review Process (RN 02-02)

UPDATE OF INITIAL STATEMENT OF REASONS

Modifications to California Code of Regulations (CCR) section (§) 2041(a) will reinsert existing language “*decisions made at*” in order to improve clarity. The change from “recommendation hearings” to “documentation hearings” is necessary since the Office of Administrative Law recently approved Regulatory Action No. RN 02-04 (Documentation Hearings). The main purpose of this action was to replace “recommendation hearings” with “documentation hearings.” The Board has not been conducting “recommendation hearings” since 1982, when former section 2267 was repealed.

Modifications to CCR § 2041(b) include a minor grammatical change—reinserting existing language—“at” in the place of “from.” This will clarify that the decision is made “at” the revocation hearing. Deleting reference to the decision as a “proposed” decision is necessary since most of the decisions are final once the hearing panel has signed them. Existing language indicating that the decision shall be “implemented immediately by the P&CSD,” and that the decisions will become “effective on the date signed by the panel,” has been reinserted. A more thorough review of Board and CDC staff responsibilities concludes that the current language is consistent with these responsibilities. Additional language stating that the Board *shall* review decisions “within 10 days of the hearing,” and, that modification to the decision may be made “within 20 days”, has been deleted. The new language specifies that “a decision may be reviewed within 10 days . . .” Since funding to the Board has been significantly reduced, the review of all revocation and revocation extension hearing decisions is not possible. The extent to which the Board reviews these cases will depend on funding.

Further changes to CCR § 2041(b) will delete reference to the “chief deputy commissioner” and reinsert existing language indicating that the “decision review unit” may make modifications to the decision. Existing language indicating that the “parole agent” (rather than “staff from P&CSD and the board”) shall implement the modified decision has also been reinserted. A more thorough review of Board and CDC staff responsibilities concludes that the current language is consistent with these responsibilities. Lastly, the Board has deleted the last sentence of this subdivision indicating that “these decisions shall become effective no later than 20 days from the hearing, unless expedited.” This existing language is not consistent with new language indicating that these decisions shall be “effective on the date signed by the panel.”

Modifications to CCR § 2041(c) will reinsert existing language indicating that the decision review unit “shall be composed of at least one deputy commissioner as designated by the chairperson . . .” An additional change replaces “chairman” with the more appropriate non-gender term—“chairperson.”

Subdivisions (c) through (k) of CCR § 2041 have been relettered to subdivisions (d) through (l) to accommodate the reinsertion of subdivision (c). New subdivision (d) regarding decisions from Mentally Disordered Offender Hearings, has implemented a minor change—adding “or patient” when referring to a parolee *or patient*, consistent with existing language in this subdivision and in PC § 2972. Modifications to subdivision (e) replace the word “ten” with the number “10” to be consistent with grammatical rules and existing format.

Subdivision (f) has been amended to clarify existing language that is redundant and unclear. The amendment will refer to the review of ISL hearings as: “Review of ISL Parole Consideration and Rescission Hearings.” Further changes will delete the term “effective” when referring to the proposed decision of the hearing panel. The new language is consistent with PC § 3041 and states as follows: “the proposed decision of the panel shall become *final [rather than effective]* within 120 days of the hearing.”

Amendments to subdivision (g) will delete existing language referring to “Extended Term” hearings. New language will more accurately refer to these hearings as “Serious Offender” hearings. Language referring to the prisoner as “a life prisoner” has been deleted since the prisoners referred to in this subdivision are not exclusively serving life terms.

Subdivision (h) has been amended to give the reviewer of life prisoner decisions 110 days rather than 90 days to modify the decision. The proposed 110-day period is a more realistic timeframe given the extensive review involved in these cases. Further changes include replacing the term “effective” with “final” when referring to the proposed decision of the panel. As discussed above, the term (“final”) is consistent with language in PC § 3041.

Modifications to subdivision (k) replace the word “ten” with the number “10” to be consistent with grammatical rules and existing format.

Amendments to CCR § 2042 will delete the phrase “or modification” when discussing whether the decision should be disapproved (*or modified*) based on criteria specified in this section. Removing this language will clarify that if specific criteria are found, the decision will be “disapproved” by the Board. Retaining this *modified* language would result in an overbroad regulation. The existence of the specified criteria—substantial likelihood of resulting in a substantially different decision—are grounds for ordering a new hearing, and not merely modifying the decision.

Amendments to CCR § 2043 replace the term “effective” with “final” to be consistent with language in the Penal Code, as discussed above.

LOCAL MANDATES

The Board of Prison Terms (Board) has determined that the proposed action will have no significant impact on local agencies or school districts.

CONSIDERATION OF ALTERNATIVES

The Board has determined that no reasonable alternative considered by the Board would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulatory action.

EFFECT ON SMALL BUSINESSES

The Board has determined that the proposed amendments will not affect small businesses because they apply only to inmates and parolees of California penal institutions.

SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT ON BUSINESS

The Board has determined that the proposed regulations will not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

FEDERAL FUNDING TO STATE

The Board has determined that the proposed amendments will have no cost or savings in federal funding to the state.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE PUBLIC COMMENT PERIOD (FROM AUGUST 30, 2002 TO OCTOBER 31, 2002)

COMMENTS NO. 1 (Rowan Klein, Esq.)

Comments:

1(a) Commenter recommends that any new information submitted pursuant to California Code of Regulations (CCR) § 2028 should be forwarded to the prisoner and counsel as soon as possible.

1(b) The decision review process should not apply to the merits of any life prisoner parole suitability determination. Further, the regulations should specify the title or position for the reviewer designated by the chief counsel.

1(c) All en banc hearings must comply with Penal Code (PC) §§ 3041.5 and 3041.7.

1(d) The Board adopted policy to disclose how each member voted at en banc hearings should be included in the regulations.

Responses:

1(a) CCR § 2041 provides that any new information received that is adverse to the life prisoner will be forwarded to the prisoner and the prisoner's attorney. "The prisoner and the attorney will be afforded an opportunity to respond in writing within a reasonable amount of time to the new information." It is the Board's intention to forward any new information received in a timely manner; no decision will be made prior to allowing an adequate amount of time for the prisoner/prisoner's attorney to respond to the new information.

Accommodation: None

1(b) CCR § 2042 provides that "[t]he purpose of the decision review process is to assure complete, accurate, consistent, and uniform decisions and the furtherance of public safety." In deciding if a decision should be disapproved or modified, Board staff shall review the information available to the panel that made the decision. Staff shall base its decision on specific criteria as outlined in CCR § 2042, and any information received pursuant to CCR § 2028. Within a specified period, the review authority may either: 1) affirm the proposed decision, 2) order a new hearing, or 3) modify the decision without a new hearing. No decision shall be modified without a new hearing if the modification would be adverse to the parolee's interest. In essence, the decision review function is a continuation of the parole consideration process. PC § 3041(a) states that the purpose is to "provide uniform terms for offenses of similar gravity and magnitude in respect to [the prisoners] threat to the public . . ."

It would be impractical to follow the Commenter's suggestion and specify in the text of the regulations the person who shall be the chief counsel designee or reviewer during the decision review process. , This is because the delegation of this function is not restricted to any specific class of individuals. Hence, for clarity and consistency purposes it is more effective to refer to the reviewer in the terms currently stated in the Board's proposed regulations.

Accommodation: None

1(c) CCR § 2044(a) provides that:

The full Board shall review within a maximum of forty-five days from the date of the hearing any proposed decision referred by a member of the hearing panel who requests the full board to consider the case, or from the date of receipt of a request for review by the Governor under the provisions of Penal Code § 3041.1. The case shall be referred to the executive officer or chief deputy commissioner for any preparation which is necessary prior to the meeting.

An en banc referral is merely another form of *review* of the proposed decision from a parole suitability hearing.

Accommodation: None

1(d) CCR § 2044 implements PC §§ 3041 and 3041 by setting out the en banc referral process, clarifying the time period for review of proposed decisions by the full Board, and the majority vote requirements. Once the Board makes its decision, staff notifies the prisoner and other parties with the results. The Board's current policy, disclosing each of the Commissioner's votes following the en banc hearing, is a means of promptly informing the public of the Board's collective decision. No law provides that the vote of an individual Commissioner affects the legal rights of the prisoner, or compels the disclosure of individual votes. In fact, the Bagley-Keene Open Meeting Act, Government Code §§ 11120-11132, states that votes made during lawfully closed sessions are confidential. It may become necessary in the future for the Board to keep confidential some or all votes that are made during Board Meeting closed session en banc reviews. Therefore, the Board declines to adopt as a regulation the commenter's proposal requiring the Commissioners' individual votes be made public.

Accommodation: None

COMMENTS NO. 2 (Prison Law Office)

Comments:

2(a) Commenter contends that the proposed regulations do not clearly represent who shall review the various Board decisions but instead, refers to "the chief deputy or designee" or "the chief counsel or a designee," without identifying that person. The language should be modified to identify who may review the proposed decisions if either the chief deputy commissioner or chief counsel is unavailable, or at the very least, identify several individuals to whom this function may be delegated.

2(b) Section 2041(d) which describes the review process for Sexually Violent Predator probable cause hearings, should be modified to indicate that "no probable cause hearing may be held more than 45 days beyond the prisoner's scheduled release date," as is stated in Welfare and Institutions Code section 6601.3.

2(c) Penal Code § 3041(b), as amended by Senate Bill 778, states that no decision of the parole panel shall be disapproved and referred for rehearing except by a majority vote of the board following a public hearing. Commenter contends that proposed section 2042 contradicts the specific language of PC § 3041(b), allowing "board staff" to review the information available to the panel. This language is illegal and not consistent with the statutory mandate.

2(d) Commenter contends that there is no rational basis for extending the time (from 45 days to 60 days pursuant to CCR §2044) within which the full board or Governor shall review any proposed decision referred by a member of the hearing panel.

Responses:

2(a) Please refer to the Board's response to 1(b) above.

Accommodation: None

2(b) In reference to incorporating language into CCR § 2041(d), stating that “no probable cause hearing may be held more than 45 days beyond the prisoner’s scheduled release date,” the proposed language refers to CCR §§ 2600-2602. Section 2600.1(c) clearly states that “. . . the parolee shall be held up to a maximum of 45 days . . . pending a superior court probable cause hearing pursuant to Welfare and Institutions Code (WIC) § 6602.” Further, CCR § 2600.1(e) states that “[h]olds imposed under this section shall terminate 45 days after imposition.” To accept the comment and repeat information both in § 2041 and in 2600.1 would violate the non-duplication standard. The cross-reference in § 2041 to § 2600.1 is the best solution aiding the user in finding the needed information. Lastly, the commenter itself already admits that the information is also in the WIC § 6602. Regulations that merely repeat statutes are not always necessary or helpful.

Accommodation: None

2(c) A Board is an entity that acts only through Commissioners and staff, each fulfilling their assigned roles. A Board must have staff to perform functions and roles as necessary. Many duties, including decision review, may properly be delegated at least to some extent. The proposed regulations are appropriate and provide staff with roles and criteria for screening parole decisions and/or recommending them for consideration by the full Board [the appointed Commissioners] for action at Board Meetings. In the alternative, if the Board declined to delegate aspects of decision review to staff [including the chief counsel], the Commissioners would not be sufficiently available for conducting the life prisoner parole suitability hearings required by due process and PC § 3041 et seq.

The proposed language in CCR § 2042 specifies the criteria to be considered by the Board in making a determination of whether to disapprove or modify a proposed decision. In making this decision, the Board shall review the information available to the panel that made the decision and any information received pursuant to CCR § 2028. The proposed language in CCR § 2042 does not contradict PC § 3041(b), but instead, serves to clarify the review process of reviews and proposed decisions. If the Board, acting through its staff, determines based on the criteria specified and any new information that a hearing decision should be disapproved, then it will then be referred to the full Board for a majority vote, as stated in PC § 3041(b).

Accommodation: None

2(d) The increase in the time from 45 days to 60 days for the full Board to review proposed decisions referred from a hearing panel member or by the Governor is necessary for the Board to make an informed decision based on the current and projected number of cases referred to it for review. The commenter does not assert, nor does the Board believe, that the proposed change would violate prisoner due process of law. The

alternative of retaining the 45-day time period is not feasible given budget and staffing forecasts, as well as endemic Commissioner position vacancies. The Board prefers to operate with policies reflecting current practices and/or feasible goals since this gives prisoners and public a more realistic view of what is likely to occur. When additional resources become available, reducing the average time for decision review will become a realistic choice among other pressing needs.

Accommodation: None

THERE WERE NO COMMENTS RECEIVED DURING THE SECOND PUBLIC COMMENT PERIOD WHICH COMMENCED ON JANUARY 7, 2003 AND ENDED ON JANUARY 31, 2003.

PUBLIC COMMENTS RECEIVED DURING THE THIRD PUBLIC COMMENT PERIOD THAT COMMENCED ON MAY 27, 2003 AND ENDED ON JUNE 13, 2003.

COMMENTER NO. 1 (Keith Wattley)

Comments:

(1) Commenter contends that the proposed changes to CCR § 2042 contradict the specific language in PC § 3041(b) which requires that no panel decision may be disapproved unless the full board consults with the panel members. He concludes that the proposed language, which allows board staff to “review the information available to the panel”, is illegal and must be replaced with language consistent with the statutory mandate.

Response:

These comments do not address the specific changes that were made during this third comment period (from 5/27/03 to 6/13/03) and are thus outside the scope of the notice of modifications. Therefore, the APA does not require any agency reply. However, without waiving that objection, the Board shall respond to this commenter’s concerns. CCR § 2041(h) provides, in cases where a review of a decision is adverse to the prisoner’s interest,

... the matter shall be referred to the full board for en banc review. No proposed decision shall be referred for a new hearing without a majority vote of the board following a public hearing. Before the matter is referred to the full board for review, the chief counsel or designee shall consult with the commissioners who conducted the hearing. Any proposed decision of the panel shall become final within 120 days of the hearing.

The language in CCR § 2042 more specifically addresses the *criteria* Board staff use to ensure that decisions made are complete, accurate, consistent, uniform and in the furtherance of public safety. The proposed changes to CCR § 2042 merely interpret but do not contradict the language specified in PC § 3041(b). While the statute provides that

the Board shall consult with the panel members who conducted the hearing, the regulation states that the chief counsel or designee shall consult with those commissioners [the term includes deputy commissioners and full commissioners]. The comment infers that the Board must itself act [perhaps through its commissioners exclusively] to confer with the original hearing panel. However, the Board often acts through or in conjunction with its staff. See the discussion of this topic in the Board's response to comment number 2(c), above.

Accommodation: None